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Office of Administrative Law Judges
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Issue Date: 01 March 2005

CASE NO.: 2004-LHC-1151

OWCP NO.: 08-121214

IN THE MATTER OF:

RAUL REYNA

Claimant

v.

UNIVERSAL MARINE SERVICE

Employer

AND

SIGNAL MUTUAL INDEMNITY ASSOCIATION

Carrier

APPEARANCES:

Sidney L. Ravkind, ESQ.

For The Claimant

Steven L. Roberts, ESQ
Jennifer O'Sullivan, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Raul Reyna (Claimant) against

Universal Marine Service (Employer) and Signal Mutual Indemnity Association (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on October 13, 2004, in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 20 exhibits, Employer/Carrier proffered 34 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That Claimant was injured on May 20, 2002.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That Employer was notified of the accident/injury on May 20, 2002.

5. That Employer/Carrier filed a Notice of Controversion on July 11, 2002.

6. That an informal conference before the District Director was held on February 9, 2004.

[1] References to the transcript and exhibits are as follows: Transcript: Tr._____ ; Claimant's Exhibits: CX-_____; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

7. That Claimant received temporary total disability benefits from May 21, 2002 through October 27, 2003 at a compensation rate of $869.01 for 75.01 weeks. Claimant also received 10% permanent partial disability benefits for his right leg, which totaled $25,027.49.

8. That Claimant's average weekly wage at the time of injury was $1303.52 with a compensation rate of $869.01.

9. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's disability; whether Claimant is entitled to continuing temporary total disability benefits from October 27, 2003 to April 1, 2004.

2. Whether Claimant has reached maximum medical improvement.

3. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at formal hearing and was deposed by the parties on June 29, 2004. (Tr. 50; EX-22). He is a United States citizen and has lived in the United States for approximately 18 years. He testified that he had nine years of schooling and had been a longshoreman for ten years.[2] (Tr. 50, 57). Claimant was injured in the late night or early morning of May 20, 2002 or May 21, 2002. At the time of his injury, he was employed by Employer as a truck driver and was considered a "temporary permanent employee." Claimant testified his truck was lifted by a crane and dropped onto the dock, causing him to sustain injuries to his neck, lower back, and right leg. (Tr. 51-52).

[2] During his deposition, Claimant stated that he went to school until the third year of a school similar to high school. (EX-22, p. 5).

Claimant began treatment for his injuries with Dr. Sardinas two days after the accident. (Tr. 52). Dr. Sardinas operated on Claimant's right leg and subsequently released him to return to work on October 27, 2003.[3] He was able to work for only two hours on November 16, 2003, due to back pain. (Tr. 53- 54).

Claimant returned to work again on November 19, 2003, and worked nine hours. Shortly after November 19, 2003, he was again examined by Dr. Sardinas; he did not return to work again until April 2, 2004. Claimant received treatment from Dr. Sardinas, along with prescription medication for his pain. (Tr. 54). Since Claimant returned to work, he has been able to regularly perform his job duties as a truck driver. (Tr. 55).

On cross-examination, Claimant testified that he had been a truck driver since 1986 and was classified as a "section 7 with the truck driving union" at the time of the accident. As of October 2004, Claimant was classified as a "section 10" which allows him more selection in jobs. (Tr. 57-58). Claimant testified that driving a truck is the easiest job for him because he does not want to risk hurting himself through a "dangerous job, like lifting." He agreed he made the decision to drive a truck before the injury occurred and testified that he "makes good money" as a truck driver. (Tr. 58, 61).

At his deposition, Claimant testified he worked as a longshoreman for seven years before his accident. (EX-22, p. 7). When he was in "section 5" he did not work primarily as a truck driver. He began working temporarily as a truck driver in "section 6." (EX-22, pp. 8-9). Claimant did not lose any seniority while he was not working due to his injury and he became a "section 9" in October 2003. (EX-22, p. 9).

At formal hearing, Claimant testified he underwent neck surgery at Ben Taub Hospital more than five years ago, after injuring his neck in an automobile accident. Although he "sometimes" was a truck driver at the time of the surgery, he was not employed as a "regular" driver. (Tr. 59). He continued driving trucks after the neck injury. (Tr. 60). He did not experience any neck problems between 2000 and 2002. (EX-22, pp. 22-23). At his deposition, Claimant testified he had only been hospitalized for the surgery in Ben Taub and after his 2002 injury. (EX-22, p. 14).

[3] During the time that Claimant was not working before October 27, 2003, he received payments of $811.50 each week from the insurance company. (Tr. 56).

Claimant's family doctor was Dr. Jesus Diaz and he began seeing Dr. Arturo Argu for depression. Before 2002, Dr. Diaz had prescribed medication for depression. (EX-22, p. 15). Claimant indicated that he had seen several other doctors for gastrointestinal problems. He had surgery to his stomach due to a hyoidal hernia approximately 12 or 13 years ago. (EX-22, pp. 16-17). He underwent a colonoscopy approximately a year and a half ago, which did not affect his ability to work. (EX-22, p. 19). At his deposition, Claimant was taking "Tranxene," 30 milligrams, and "Mirtzzapez," 11.25 milligrams. Both drugs were prescribed by Dr. Argu. (EX-22, pp. 19-21).

Claimant testified at his deposition that he began losing his memory when he injured his head, but later indicated he is unsure whether it is a result of his current medications. He believes his depression is related to his work accident. (EX-22, pp. 11, 27-28). He has seen only Dr. Argu for his "mental problems." He went to a group therapy class at the referral of Dr. Argu, but testified he was not given any "psychological treatment . . . like pills or anything like that . . . ." (EX-22, p. 28).

Claimant testified at formal hearing and at his deposition that he does not need additional knee surgery. He also testified that his back currently did not prevent him from working. (Tr. 60-61; EX-22, pp. 26-27). At his deposition, he indicated his right leg had atrophied and felt weak. Although his lower back did not hurt to the point that he "can't stand it," Claimant testified his lower back pain is bothersome and he does not have strength to pick up heavy objects. (EX-22, pp. 26-27). Claimant testified he can lift between 35 pounds and 40 pounds. (Tr. 56).

Claimant missed two weeks of work when he was treated at the Delas Americas Clinic for depression.[4] (Tr. 61). Since October 2003, Claimant missed days of work for treatment of health problems unrelated to his knee injury. (Tr. 62-63). Through interrogatories, Claimant indicated he had only seen Dr. Sardinas and Employer's doctors since his injury. At formal hearing, Claimant agreed he had seen several other doctors since October 2003. (Tr. 63). On re-direct examination, Claimant testified his knee and his back problems prevented him from working. He returned to work as soon as he felt he could do so

[4] On June 4, 2004, Claimant sought treatment for depression, anxiety, and paranoia at Clinica Las Americas. (EX-28). Claimant initially was taken off work from June 5, 2004 through June 19, 2004, but obtained a release to return to employment on June 17, 2004. (EX-28, pp. 5-6).

without further injury. (Tr. 67).

In May 2004, Claimant declined a settlement offer of $20,100.00, in addition to the two percent permanent partial scheduled impairment that had been paid. (TR. 64; EX-29). Claimant testified he was not aware of another settlement offer of $25,100.00, in addition to the two percent impairment payments. (Tr. 64-66). On re-direct examination, Claimant agreed he discussed with his attorney that Employer would be willing to pay "a little bit more money," although they did not discuss an amount. (Tr. 66-67).

Claimant began working two months prior to his deposition, primarily for a company named Seres. He worked for Employer "several times," but could not recall the dates. (EX-22, p. 12). Since 2002, he has not worked anywhere other than "the waterfront," nor has he looked for work anywhere other than "the waterfront." (EX-22, pp. 29-30).

John Gillette

Mr. Gillette is employed as an insurance adjuster with Abercrombie, Simmons, and Gillette. He became responsible for handling the present claim at the time of the informal conference in February 2004. (Tr. 69).

After attending the informal conference, Mr. Gillette determined Claimant's average weekly wage was $1,303.52, which included container royalty and vacation pay. (Tr. 70-71). At formal hearing, Mr. Gillette testified that Claimant's average weekly wage for the 52 weeks prior to injury was $1,213.78, without including container royalty and vacation pay. (Tr. 71-72).

Mr. Gillette further testified that Claimant's post-injury average weekly wage from April 2, 2004 through August 19, 2004, would be $1,218.49. (Tr. 72). The post-injury calculation does not include "vacation pay and container pay."[5] (Tr. 73). The calculation also does not include the two weeks of work that Claimant missed while undergoing treatment for depression. (Tr. 74).

The issue of average weekly wage was raised at the informal

[5] For the purpose of "earnings," vacation pay and container pay are determined on October 1st of each year. According to Mr. Gillette, there were no numbers available for calculation of vacation pay at the time of formal hearing. (Tr. 73).

conference. Subsequently, Mr. Gillette included the "container royalty" in the calculation. (Tr. 75, 80). At the informal conference, Mr. Gillette made a verbal offer of "ten percent impairment" plus payment of compensation through that date. The offer was declined. (Tr. 76).

On May 10, 2004, Mr. Gillette sent Claimant a letter offering to conclude the case with a payment of $20,100.00, which represented the difference between a two percent impairment rating and a ten percent impairment rating. (Tr. 75, 83, 88; EX-29). Mr. Gillette agreed to pay the adjusted compensation rate for the "period of time up until December 27th."[6] (Tr. 83).

On August 23, 2004, Mr. Gillette had not paid the $20,100.00 and offered an additional $5,000.00 to settle the claim. Thus, the August 23, 2004 offer consisted of an offer of ten percent permanent partial disability for Claimant's leg, "plus $5,000.00 against the total disability claim from October 27th until April the 2nd." (Tr. 83-84, 88). The additional $5,000.00 was estimated to be six to seven weeks of compensation at a rate of $870.00 per week, which Mr. Gillette testified was "about 25 percent of the disputed temporary total disability from the time compensation was stopped until the time [Claimant] actually returned to work." (Tr. 84-85).

In September 2004, Mr. Gillette voluntarily paid the highest rating that was provided, i.e., ten percent for a scheduled impairment. He did not withdraw the settlement offer. (Tr. 77-78, 85, 88). Subsequently, Mr. Gillette was forwarded a letter from Claimant indicating that the only disputed issue was "temporary total disability from October 27th until the beginning of April . . . ." Mr. Gillette responded by letter indicating that there was an offer of $5,000.00 as payment for the "disputed time that the employee continued to stay off work after being released by his own doctor."[7] (Tr. 78; EX-32). Claimant had already been paid the additional $20,100.00 offered in the earlier settlement letter, which represented the "additional two percent to ten percent impairment rating." (Tr.

[6] The hearing transcript reflects a date of December 27th. However, the May 10, 2004 letter indicates that Mr. Gillette requested an adjustment in Claimant's compensation rate for the temporary total disability paid from May 21, 2002 through October 27, 2003. He also requested an adjustment to the two percent permanent partial disability payments to reflect the revised average weekly wage and compensation rate. (EX-29, p. 1).

[7] The offer of $5,000.00 was in addition to the payments for ten percent impairment and payments through the date of Claimant's release to work by his own doctor. (Tr. 78).

78).

The Medical Evidence

Dr. Alfredo Sardinas

Dr. Sardinas, a board-certified orthopedic surgeon, was deposed by written questions on October 8, 2004, and was orally deposed by the parties on November 2, 2004. (CX-19; EX-34).

On May 23, 2002, Claimant presented with complaints of injuries to his cervical and lumbar spine, his right shoulder, and both knees. Physical examination of Claimant's cervical and lumbar spine revealed "tenderness in the paravertebral musculature bilaterally." Dr. Sardinas found a limited range of motion of 25% in all directions in Claimant's cervical spine. Examination of his lumbar spine showed "tenderness into the right sciatic notch area." Physical examination of Claimant's right knee indicated "tenderness over the medial joint line area and the medial collateral ligament." Claimant's left knee was tender over the "medial and lateral joint line area." X-rays did not show any fractures to his right shoulder or either knee. Dr. Sardinas opined Claimant suffered a "traumatic sprain of the cervical and lumbar spine." He prescribed physical therapy and ordered an MRI of Claimant's right knee. (CX-14, p. 1).

On May 30, 2002, Claimant presented with complaints of tenderness in his cervical and dorsolumbar spine, as well as in his right knee. Physical examination of his right knee was consistent with the prior visit. (CX-14, p. 2). On June 11, 2002, a review of an MRI of his right knee revealed a "tear of the body of the medial meniscus." (CX-14, p. 3; CX-13, p. 12). Claimant continued to complain of tenderness in his cervical spine. Dr. Sardinas ordered an MRI or CAT scan to determine if Claimant suffered from a herniated cervical disk. Claimant was prescribed physical therapy and anti-inflammatory medication. (CX-14, p. 3).

On June 21, 2002, Claimant returned with complaints of tenderness in his cervical spine. Claimant also presented with complaints of tenderness in his lower back and in the "right sciatic notch area." X-rays of his lumbosacral spine did not reveal any acute pathology. (CX-14, p. 4). On July 11, 2002, Claimant returned with continued complaints of pain in his right knee and cervical spine. The MRI of his cervical spine revealed "straightening of the mid-cervical lordosis seen with muscle spasm or strain and evidence of postoperative changes at C4-C5

and a herniated nucleus pulposus at C6-C7."[8] (EX-34, p. 30; CX-14, p. 5).

On September 18, 2002, Dr. Sardinas performed an arthroscopy of Claimant's right knee. (CX-11).

Dr. Sardinas signed a report dated July 14, 2003, which indicated that an MRI of Claimant's lumbar spine, dated October 14, 2002, revealed a "posterior 2 to 3 mm discal protrusion/herniation pressing against the anterior thecal sac at the L4-5 level." It further indicated "a broad posterior 2 mm annular disc bulge pressing against the anterior thecal sac" at the "L2-3 level," as well as dehydration changes at the "L3-4 disc." (CX-13, pp. 1, 13-14). Claimant presented complaints of weakness in his right leg with a "persistent pinching pain" when trying to lift the leg. Examination of Claimant's legs revealed atrophy of his right thigh in comparison to his left thigh. (CX-13, p. 1). The report further indicated Claimant had an impairment rating of ten percent to his right lower extremity due to his knee, and an impairment rating of ten percent to his left lower extremity due to his knee. In addition, a ten percent impairment was assigned to Claimant's "Lumbosacral DRE" and a four percent impairment was assigned to his "Cervicothroacic DRE." (CX-13, pp. 2-5). On July 18, 2003, Dr. Sardinas opined that Claimant reached MMI on July 18, 2003, with a permanent impairment of 23%.[9] (CX-13, p. 7).

On September 30, 2003, Dr. Sardinas indicated Claimant experienced less tenderness in his lower back. According to Dr. Sardinas's report, Claimant "understands after this he is going to be released to return to work." (CX-13, p. 8). On September 25, 2003, an examination of Claimant revealed that he was "doing better in his left thigh" and that he had symmetrical quadriceps. The report indicates that Claimant "will continue to work." (CX-13, p. 8).

On October 7, 2003, Claimant returned with complaints of tenderness in his lower back. Dr. Sardinas indicated Claimant was "slowly doing better." Claimant was to be released for

[8] According to Dr. Sardinas, the "straightening of the mid-cervical spine due to muscle spasm" indicated an "acute injury." He opined that Claimant would not have "spasm" due to the prior neck surgery. Despite Claimant's pain in his cervical spine, Claimant complained of the most pain in his lower back. (EX-34, p. 30).

[9] In a report dated July 17, 2003, Dr. Sardinas assigned a "combined disability rating of 23% from the different parts of the body." (CX-13, p. 8).

regular duty work on October 27, 2003. (CX-13, p. 8; EX-12). The work restriction evaluation approved by Dr. Sardinas on October 7, 2003, indicated that Claimant had reached MMI and could work eight hours a day. Further, Dr. Sardinas assigned no activity restrictions, nor did he assign restrictions to Claimant's weight lifting capacity. (EX-34, p. 40; EX-13, p. 1).

On November 20, 2003, Claimant presented with continued complaints of tenderness in his lower back into both lower extremities. His progress note indicates that "patient working." Dr. Sardinas did not change Claimant's status or take him off work. Claimant indicated the pain was worse on his right side. Claimant was to continue to work. (CX-13, p. 9). Dr. Sardinas prescribed Darvocet 100 and Flexeril. Darvocet is a mild narcotic medication and patients are instructed not to drive while taking it. (EX-34, pp. 67, 81). On December 12, 2003 and January 6, 2004, Claimant returned for follow-up visits with no change in his condition. He also indicated that Claimant was disabled until October 27, 2003, but was then returned to work. There is no indication that Claimant reported that he was unable to work. Claimant's work status remained unchanged. (CX-13, p. 9). On January 6, 2004, Dr. Sardinas approved a Texas Workers' Compensation Work Status Report which indicated Claimant was allowed to return to work without restrictions as of October 27, 2003. (EX-15).

On January 16, 2004, Dr. Sardinas indicated that Claimant "is on supportive medication and has improved." He opined that Claimant's herniated disc at "L4-5 in the lumbar spine" may have interfered with his ability to earn pre-injury wages. There is no indication that Claimant reported he was unable to work or that his work status changed. (CX-13, p. 9). On January 27, 2004, Claimant continued to complain of tenderness in both lower extremities, but Dr. Sardinas indicated he was "slowly getting better." Dr. Sardinas did not change Claimant's work status or discontinue his work release. (CX-13, p. 9).

On February 24, 2004, Claimant again presented with complaints of tenderness in both lower extremities which was worse on the right side. (CX-13, p. 10). Dr. Sardinas again approved a Texas Workers' Compensation Status Report that allowed Claimant to return to work without restrictions as of October 27, 2003. (EX-16).

On March 23, 2004, Dr. Sardinas indicated that Claimant was "slowly feeling better in his lower back." The report revealed

"less tenderness in the right sciatic notch area into the right posterior thigh." Claimant expressed a desire to return to work. (CX-13, p. 10). On April 20, 2004, Claimant returned to Dr. Sardinas with complaints of some lower back tenderness. Claimant had returned to work as a driver and was "doing okay." Claimant was to continue working. (CX-13, p. 10).

During his oral deposition, Dr. Sardinas referred to notes from an August 25, 2004 examination of Claimant which reflected that he was feeling better overall, but complained of "tenderness in his cervical spine and in his lower back down the left lower extremity." (EX-34, p. 9). The August 2004 examination took place after Dr. Sardinas received written questions from Claimant. He hand-wrote answers to some of the questions at the time of the examination, but did not finalize his responses until October 2004. (EX-34, pp. 11-12).

A functional capacity evaluation (FCE) of Claimant was prepared for Dr. Sardinas by Professional Therapy in Houston, Texas.[10] The physical therapist employed by Dr. Sardinas is Joseph Da Jose.[11] Mr. Da Jose assigned an impairment rating of ten percent to Claimant's right knee and a ten percent impairment rating to Claimant's left knee.[12] (EX-34, pp. 25-26; EX-A). Dr. Sardinas stated that he "would have to check" to determine if the impairment rating reflected ten percent impairment to both knees combined or to each knee individually, but opined that the impairment rating "should be ten percent combined." Dr. Sardinas opined that a ten percent impairment is

[10] Dr. Sardinas testified that the therapist who works for him in his office also works at Professional Therapy. When the therapist performs FCEs, he refers the patients to Professional Therapy. Dr. Sardinas testified that he has no ownership interest in Professional Physical Therapy located in Houston, Texas, but he testified that he has an ownership interest in Professional Physical Therapy which is the therapy unit in his office. (EX-34, pp. 15-16).

[11] In response to written question No. 11, Dr. Sardinas indicated that the attached report was "a true and correct copy" of his report. (CX-19, p. 13). However, at the oral deposition, Dr. Sardinas testified that the report attached to the written questions included pages of the evaluation performed by Mr. Da Jose. Dr. Sardinas testified that the report was done by the physical therapist, but he made any revisions. (EX-34, pp. 23-24). The report attached at to the deposition by written questions is the July 14, 2003 report discussed earlier. Mr. Da Jose is a licensed physical therapist in the state of Texas and was licensed at the time he evaluated Claimant. (CX-23).

[12] According to Dr. Sardinas, Mr. Da Jose evaluated Claimant's left knee because both knees were injured in the accident. (EX-34, p. 22).

"within limits" for the right knee given the previous surgery on the torn meniscus. (EX-34, p. 27).

In his deposition by written questions, Dr. Sardinas indicated, for the first time, that Claimant remained totally disabled from returning to his "usual employment" until April 1, 2004. (CX-9, pp. 8, 15). At the oral deposition, Dr. Sardinas stated that Claimant wanted to go back to work in October 2003, although he was not "ready" to return to work. Dr. Sardinas indicated that he released Claimant to work based on Claimant's request. Claimant was not able to perform his job duties. At a later date, Dr. Sardinas was asked whether he thought Claimant should have returned to work prior to April 1, 2004. Despite his release of Claimant in October 2003, Dr. Sardinas maintained, at his deposition, that Claimant should not have returned to work before April 1, 2004, noting that Claimant had a herniated disc in his lumbar spine. (EX-34, pp. 37-39; 46-47). Nonetheless, Dr. Sardinas failed to express his opinion in his notes prior to October 8, 2004. (EX-34, p. 39).

According to Dr. Sardinas, Claimant was not "ready to perform the job that he went back to perform" due to the herniated disc in his lumbar spine. (EX-34, pp. 50-51, 55-56). Although, Dr. Sardinas did not believe Claimant should have returned to work, he placed Claimant at MMI "because he wanted to go to work" and he had to be at MMI for release to full duty work. (EX-34, pp. 48, 53, 55-56). Although Claimant's symptoms could have and did worsen, Dr. Sardinas testified that it was "medically safe" for Claimant to return to work in October 2003. (EX-34, pp. 56-57).

At the time of his oral deposition, Dr. Sardinas testified that he believed Claimant reached MMI to go back to work as of April 1, 2004. (EX-34, p. 58). According to Dr. Sardinas, Claimant is at "maximum medical recovery to the point of being able to work and be proficient to society." (EX-34, pp. 59-60). Dr. Sardinas noted, however, that Claimant's condition is "not going to go away" and that Claimant may or may not eventually need surgery. (EX-34, p. 60). Dr. Sardinas could not state whether or not Claimant had a herniated nucleus pulposus before the MRI was performed. (EX-34, p. 80).

In the deposition by written questions, Dr. Sardinas agreed that the condition of Claimant's right leg, lumbar spine, and cervical spine were caused or aggravated by the 2002 accident. (CX-19, pp. 7, 15). He further opined that, in "hindsight," Claimant's initial return to work was "premature." (CX-19, pp.

8, 15).

Dr. J. Martin Barrash

Dr. Barrash is board-certified in neurological surgery and was deposed by the parties on August 4, 2004. (EX-23). He estimated that 30% to 35% of his "gross collections" stem from medical/legal work which includes depositions and review of x-rays and medical records. Approximately one-third of his work is comprised of seeing patients as he did in the present case. (EX-23, p. 40).

Dr. Barrash first examined Claimant on July 16, 2002. (EX-17). He reviewed the records of Ben Taub General Hospital, Harris County Hospital District, Dr. Hurt, Dr. Sardinas, and Dr. Keichian. He also reviewed x-ray imaging reports and an accident report. He obtained Claimant's complete history and performed a physical examination. (EX-23, pp. 9-10).

Claimant presented with complaints of back and neck pain. Dr. Barrash performed a "pin test" on Claimant, which revealed "decreased pin on the entire left upper extremity, the torso, and the left lower extremity which ended in the midline." According to Dr. Barrash, the results indicated Claimant was telling him "information which is not borne out by the nervous system." Consequently, Dr. Barrash concluded the results as indicated by Claimant were "not real."[13] (EX-23, pp. 10-11). In addition, Claimant's neck extension was "virtually zero degrees." Dr. Barrash indicated that Claimant's neck muscles were "perfectly soft and normal" and he would have expected normal neck extension. (EX-23, pp. 11-12). He also indicated that he expected to see normal neck rotation, rather than rotation of 15 degrees to the right and 25 degrees to the left. (EX-23, p. 12).

As to Claimant's knees, Claimant had a "positive MRI of his knee."[14] Claimant stated that he had no difficulty walking and experienced discomfort only when he stooped or bent down. (EX-23, p. 13). Claimant also experienced discomfort in lifting

[13] Dr. Barrash did find a "very minor abnormality" in Claimant's left "brachioradialis" reflex compared to the right, which he opined was not of any significance. The reflexes were equal at the second examination on October 8, 2003. (EX-23, p. 18).

[14] Dr. Barrash stated that he is not an orthopedist and does not "hold [himself] out as an authority at looking at knee MRIs." The abnormality in the MRI of Claimant's right knee was noted by the radiologist. (EX-23, p. 22).

objects and felt increased pain with movement. Although Claimant's low back pain had improved, he experienced pain on the right side of his waist. Dr. Barrash noted Claimant's pertinent medical history included a fractured vertebra from a 1985 automobile accident, for which Claimant underwent an "anterior interbody diskectomy and fusion at C4-5." (EX-17, p. 2).

At the time of the July 16, 2002 examination, Dr. Barrash did not have any x-rays or imaging studies to review. (EX-17, p. 2). Subsequently, Dr. Barrash reviewed the June 24, 2002 MRI study of Claimant's cervical spine. On July 24, 2002, Dr. Barrash noted a "very mild annular bulge, of no significance" which was "not touching the thecal sac or displacing any tissue." (EX-18, p. 1). Dr. Barrash felt the MRI was expected for a man of Claimant's age, with the exception of the previous fusion. According to Dr. Barrash, the MRI revealed nothing that would require surgery.[15] (EX-23, p. 14).

Dr. Barrash generated another report on October 8, 2003. He reviewed all of Claimant's medical records after July 16, 2002, which included the records of Dr. Sardinas, the FCE, the work hardening evaluation, records of psychotherapy, and Claimant's impairment rating. (EX-23, p. 15). A physical examination of Claimant revealed that he was neurologically "normal," with "some decreased sensitivity to pin on the right foot . . . ." (EX-23, p. 16). He noted that Claimant was able to flex 90 degrees when seated, but could flex only to 50 degrees when standing. Dr. Barrash identified this as a "slight inconsistency." (EX-23, p. 21). Dr. Barrash noted atrophy of Claimant's right thigh and calf when compared to his left thigh and calf. (EX-19, p. 1; EX-23, p. 17). He further indicated that Claimant's right knee had improved since the September 25, 2002 arthrotomy and arthroscopy, although Claimant indicated that his leg continued to "give out at times." Claimant complained of back pain, which was described as "present though it is not as severe." (EX-19, p. 1). Dr. Barrash noted that Claimant was released to return to work on October 27, 2003. On October 8, 2003, he agreed with Dr. Sardinas's decision to allow Claimant to return to work and opined that Claimant had reached

[15] Dr. Barrash reviewed the films of the cervical MRI and found "nothing there." His testimony discounts the reading of the lumbar MRI based on the lack of "findings" to support the radiologist's reading of the cervical MRI. Nonetheless, he testified that Claimant did not have any "lumbar spine complaints." Thus, an MRI of Claimant's lumbar spine would not have impacted his evaluation, even if he had been aware of the MRI at the time he examined Claimant. (EX-23, p. 26)

MMI. (EX-19, p. 2). He did not perform a "disability evaluation" on Claimant, but found nothing to contradict Dr. Sardinas's conclusion that Claimant had reached MMI. (EX-23, p. 29).

Dr. Barrash disagreed with the impairment rating assigned to Claimant on July 17, 2003. He testified that Claimant does not have a 23% disability. Dr. Barrash indicated that a ten percent disability to Claimant's knee is "fair." (EX-23, p. 30). In his opinion, Claimant's right knee atrophied as a result of "disuse" due to his knee problem and surgery. Although he found atrophy in Claimant's right leg, he did not find weakness in the leg. (EX-23, p. 31).

Dr. Gary C. Freeman

Dr. Freeman, a board-certified orthopedic surgeon, was deposed by the parties on August 12, 2004. (EX-24).

On February 16, 2004, Dr. Freeman examined Claimant. (EX-20). He reviewed the records from Dr. Sardinas, the imaging records, the FCE, the reports from Dr. Barrash, and the 1997 records from Ben Taub. (EX-24, p. 8). Dr. Freeman obtained a patient history, which revealed that Claimant injured his right knee and low back in a work-related accident.

Dr. Freeman reviewed the MRI interpretive report of Claimant's low back, but did not review the actual films. (EX-24, p. 29). Dr. Freeman noted that Claimant's MRI "showed multiple levels of degenerative disk disease, but no herniation." (EX-20, p. 2). He stated that nothing indicated a change in the "spinal structure" caused by an injury and stated that the MRI was normal for a man of Claimant's height, weight, and age. (EX-24, p. 14).

He further indicated that the MRI of Claimant's knee "simply showed a degenerative meniscal tear and the surgery was performed on the serendipitous basis of the MRI." (EX-20, p. 2). At his deposition, Dr. Freeman stated that Claimant's injury probably did not cause the meniscus tear. According to Dr. Freeman, a meniscus tear occurs only when there is "a torsional force on the knee with the foot fixed," which did not happen in this instance. (EX-24, pp. 12-13, 27). At the time he rendered his report, Dr. Freeman had not reviewed Claimant's emergency room record, the "life flight" records, or any records reflecting "the actual mechanism of [Claimant's] injuries. (EX-24, p. 26). Although he stated that Claimant's accident could

have aggravated the pre-existing knee condition, Dr. Freeman opined that it did not aggravate the condition. (EX-24, p. 13).

On physical examination, Dr. Freeman noted Claimant walked with a "nonantalgic gait." Claimant had a level pelvis, which indicated there was no "muscle spasm tilting in his pelvis." Dr. Freeman found Claimant had "lumbar lordosis" which reversed as he bent forward. According to Dr. Freeman, this indicated a "sway back" and was normal. He found no neurological deficit in "the motor units of the lower extremity." (EX-24, p. 9). Claimant had a "negative straight leg bilaterally to 90 degrees" which indicated no compression on the sciatic nerve. He found the "L3-4 and L5-S1" nerves were functioning and unimpaired based on "equal and active" ankle and knee reflexes. He opined that the atrophy in Claimant's right thigh was a result of knee surgery. (EX-24, pp. 10, 36). Dr. Freeman indicated that Claimant had "full flexion" in his knee. He noted "symmetrical crepitus" in both knees. EX-24, p. 10).

As to Claimant's cervical spine, Dr. Freeman reviewed the MRI reports, but did not review the films. He opined that the discal protrusion at "C6-7" was not caused by the accident at issue. Rather, as with Claimant's lumbar spine, the protrusion was normal for a man of Claimant's height, weight, and age. (EX-24, p. 15).

Dr. Freeman opined Claimant reached MMI and could have returned to work without restrictions on October 8, 2003. (EX-20, p. 2). At his deposition, Dr. Freeman testified Claimant could have returned to work ninety days after his injury on August 20, 2002. He also opined Claimant reached MMI on August 20, 2002. (EX-24, p. 16). He found "no demonstrable, objective pathology" which would "explain either the magnitude or perpetuation of the subjective complaints on any objective pathologic basis." (EX-20, p. 2). Dr. Freeman assigned a two percent impairment to Claimant's right knee due to the "partial meniscectomy."[16] (EX-20. p. 3). However, he opined Claimant had "zero impairment" caused by the injury at issue. (EX-24, p. 17). He could not assign an impairment rating to Claimant's lower back because of the "absence of injury produced pathology." (EX-20, p. 3; EX-24, p. 17). He disagreed with Dr. Sardinas' final impairment rating of 23% to Claimant's whole person. [17]

[16] He based the impairment rating on the guidelines set forth in the Fifth Edition of the AMA Guides. (EX-24, p. 16).

[17] Dr. Freeman testified that he has advanced training in teaching the use of the AMA Guidelines. He is certified through the American Board of Independent

Although Dr. Freeman stated that Claimant's prior neck fracture constituted a "permanent impairment," he testified that the May 2002 accident did not aggravate Claimant's neck condition. (EX-24, p. 19). As a result of the accident, he opined that Claimant might have temporarily experienced a limited range of neck motion. (EX-24, p. 44). Dr. Freeman concluded there was "no injury-produced dysfunction" other than Claimant's surgery. (EX-24, p. 10).

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According to the "life flight report," Claimant was ejected from the driver's side window when the crane dropped his truck. The report indicates that Claimant only complained of right shoulder pain. Claimant's vital signs did not change during the flight and he did not experience any complications. (CX-12, p. 1). On May 21, 2002, an examination of Claimant's lumbar spine revealed no evidence of fracture or "subluxation." (CX-12, p. 3).

The Vocational Evidence

Functional Capacity Evaluation

On January 20, 2003, a FCE report was generated by Professional Physical Therapy based on an examination of Claimant. Claimant presented with complaints regarding his right knee and lumbar areas. According to the FCE, Claimant had decreased range of motion in his right knee and continued complaints of knee pain. The FCE also reflected that Claimant had decreased muscle strength and "poor endurance" to sitting and standing. (CX-3, p. 1).

Physical examination revealed a normal gait. Claimant had a "palpable" muscle spasm in the "lumbosacral paraspinal." There was also palpable tenderness along the medial joint line of his right knee. The FCE concluded that Claimant could perform at a "light physical demand level," but was "not safe to go back to work." (CX-3, p. 2). An analysis of Claimant's "physical demands" indicated Claimant could sit for three hours and walk for 30 minutes. It indicated Claimant could lift and carry weights of 10 to 40 pounds. Claimant demonstrated a dynamic push/pull ability at 5 to 20 pounds. (CX-3, p. 8).

Medical Evaluators and is "advanced certified" with the American Academy of Disability Evaluating Physicians. (EX-24, p. 21).

A second FCE was generated on July 14, 2003, which noted a "general improvement" in Claimant's condition. Claimant demonstrated increased lifting and push/pull capabilities. He also exhibited increased tolerance to prolonged postures. Claimant's strength and flexibility increased as well. The FCE recommended that Claimant could return to work with "modified responsibilities." (CX-3, p. 10). According to the FCE, Claimant could perform tasks of sitting, walking, and lifting at modified demand levels. He could perform standing tasks at the level demanded by his former job. He could not perform pulling/pushing, climbing, or carrying activities at the levels demanded by his job. (CX-3, p. 11).

At the time of the second FCE, Claimant continued to present with complaints of weakness in his "right lower extremity." He complained of "persistent pinching pain inside the right knee especially when trying to lift the leg." The FCE noted Claimant's right thigh exhibited atrophy in comparison to his left thigh. The FCE also noted Claimant exhibited "persistent posture and gait deviations." Claimant also complained of lumbar pain. (CX-3, p. 12).

Claimant increased his lifting capacity from 48 pounds to 93.4 pounds, or a "medium heavy PDC level." He was able to push at 60 pounds and pull at 54 pounds. Claimant could stand for one hour and walk for one hour. According to the FCE, Claimant could sit continuously for six hours. However, Claimant's job required occasional lifting of 100 pounds, pulling of 200 pounds, and sitting for 8 hours. The FCE indicated that Claimant's "general mobility" had improved, but was not at "full range." (CX-3, p. 13).

Susan Rapant

Ms. Rapant performed vocational assessment reports on Claimant. The first report in the record reflects a service period of October 9, 2003 to November 8, 2003. (CX-9, pp. 7-8). Ms. Rapant reviewed a "Report of Medical Evaluation" pertaining to Claimant. She noted that Claimant had a 23% impairment rating and was capable of pushing 60.9 pounds and pulling 54 pounds. She also noted Claimant's ability to sit for six hours, stand for one hour, and walk for 40 minutes. (CX-9, p. 7). Ms. Rapant's report described Claimant as "motivated, but fearful of re-injury." She also indicated that the "continuing feasibility for success" was good. (CX-9, p. 8).

Another vocational assessment report was generated for the period of November 9, 2003 through December 8, 2003. It indicated that Claimant reported to work on November 7, 2003, but could only work for two of his four scheduled hours because he could not perform his job functions. Claimant reported that he suffered from depression, anxiety, and insomnia. (CX-9, p. 5). The "continuing feasibility for success" remained "good." (CX-9, p. 6).

The vocational assessment report for December 9, 2003 through January 8, 2004, indicated that Claimant had not returned to work since November 2, 2003. Claimant reported that he experienced increased pain with activity. The "continuing feasibility for success" was identified as "poor." (CX-9, pp. 3-4).

A final vocational assessment report was generated for the period between January 9, 2004 and February 8, 2004. The report reflected a meeting with Dr. Sardinas. Dr. Sardinas examined Claimant several times during January 2004. Claimant indicated that he was not able to return to his previous employment and Dr. Sardinas opined that Claimant could not return to his previous employment. Again, the "continuing feasibility for success" was rated as "poor." (CX-9, pp. 1-2).

The Contentions of the Parties

Claimant contends he sustained injuries to his neck, low back, and right leg on May 20, 2002. Claimant contends he was not able to return to work until April 2, 2004, and that the October 2003 release to work was premature. Consequently, Claimant believes he is entitled to an award of temporary total disability through April 2, 2004. Claimant further contends that his right knee injury resulted in a permanent impairment of 11% to 15% in his right leg. He argues that the disability rating system used in the state of California is appropriate for the determination of his impairment in the instant case. Claimant concedes that he is able to earn "substantially the same wages" as he earned prior to the May 2002 injuries and has not suffered a loss of wage earning capacity.

Employer contends that the only issues disputed in the current case are (1) the extent of permanent impairment of Claimant's right leg, and (2) the date of MMI. Employer argues that the impairment rating for Claimant's right leg does not exceed ten percent. Employer further argues that Claimant is not entitled to temporary total disability benefits after

October 27, 2003. According to Employer, Claimant reached MMI on October 27, 2003, and was capable of returning to work without restrictions at that time.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

The parties stipulated that Claimant was injured in an accident during the course and scope of his employment on May 20, 2002. At formal hearing, Claimant testified that he sustained injuries to his right knee, neck, and lower back.[18]

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982). Claimant is entitled to the Section 20(a) presumption if he shows that he suffered a harm and that employment conditions existed at work which could have caused, aggravated, or accelerated the condition. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 144 (1991).

[18] The claim for compensation and notice of informal conference also identify an injury to Claimant's right shoulder. However, Claimant did not include this injury in his brief nor was it mentioned at formal hearing. Nonetheless, a review of the medical records revealed that Claimant complained of right shoulder pain only at the time of the accident, at the time of his initial examination by Dr. Sardinas, and during his second FCE in January 2003. No fractures were shown in an x-ray of Claimant's right shoulder. Given the limited complaints of right shoulder pain and the absence of an identifiable injury through x-rays, I find and conclude Claimant has not established that he suffered a right shoulder injury. Consequently, I find and conclude Claimant has not established a **prima facie** case of a compensable right shoulder injury.

(a) Right knee injury

I find and conclude Claimant suffered a compensable right knee injury based on the stipulations of the parties. The joint exhibit submitted by the parties stipulates that Claimant was injured in an accident during the course and scope of his employment on May 20, 2002. Although the joint stipulation does not specifically refer to Claimant's right knee injury, Employer admitted Claimant suffered an injury to his leg in the accident in its response to Claimant's "Request for Admission No. 1." Further, Employer paid scheduled disability benefits for an injury to Claimant's right leg. Based on the foregoing, I find and conclude the parties stipulated to the compensability of Claimant's right knee injury.

(b) Neck and back injuries

The joint stipulation submitted at formal hearing does not specify which injuries are stipulated as work-related. Although Employer's response to Claimant's "Request for Admission No. 1" admits that Claimant's neck and low back injuries were suffered in the May 20, 2002 accident, the record contains reports from physicians which arguably do not support a stipulation of compensability. Consequently, a review of the record is necessary.

Dr. Sardinas's initial evaluation notes complaints of injuries to Claimant's cervical and lumbar spine. These complaints continued over the course of his treatment with Dr. Sardinas. Although Claimant had a prior injury and surgery to his neck, the results of the MRI of his cervical spine indicated an "acute injury" identified by "muscle spasm." Further, an MRI of Claimant's lumbar spine revealed a herniation and "annular disc bulge." Dr. Sardinas opined that the conditions present in Claimant's cervical and lumbar spine were caused or aggravated by the 2002 accident. Based on the foregoing, I find Claimant has established that the work-related accident could have caused the harm or pain to his neck and back.

Thus, Claimant has established a **prima facie** case that he suffered an "injury" under the Act, having established that he suffered a harm or pain on May 20, 2002, and that his working conditions and activities on that date could have caused the harm or pain for causation sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982).

It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Although Employer did not argue the issue of the compensability of Claimant's neck and back injuries in its brief, Employer's exhibits include reports and depositions of physicians who disagree with Dr. Sardinas's opinion of causation. Dr. Barrash opined that the MRI of Claimant's cervical spine was normal for a man of Claimant's age and revealed nothing of "significance." Dr. Freeman reviewed the MRIs and found evidence of degenerative disc disease, but no herniation. Dr. Freeman agreed with Dr. Barrash's opinion and stated that the MRIs of Claimant's cervical and lumbar spine were normal for a man of Claimant's age, weight, and height. Dr. Freeman testified that Claimant's pre-existing neck injury was not aggravated by the May 2002 accident.

Based on the reports and testimony of Dr. Barrash and Dr. Freeman, I find Employer has successfully rebutted the Section 20(a) presumption that Claimant suffered a neck and back injury as a result of the work-related accident on May 20, 2002. Therefore, the record evidence as a whole must be weighed and evaluated to determine work-relatedness and causation.

3. Weighing the Record Evidence

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician

were entitled to greater weight than the opinions of non-treating physicians).

I find and conclude Claimant suffered compensable neck and back injuries. The record reflects complaints of pain in Claimant's cervical spine and lumbar spine immediately following the May 2002 accident and continuing throughout his course of treatment with various physicians. Although Employer presented testimony of two physicians who opined that Claimant's back injuries were unrelated to the accident, I place greater weight on the opinion of Dr. Sardinas who opined Claimant's injuries were caused or aggravated by the May 2002 accident. Consequently, I find that the record as a whole supports a conclusion that Claimant sustained compensable work-related injuries to his neck and back.

Based on the foregoing, I find and conclude Claimant sustained a compensable right knee injury pursuant to the stipulations of the parties. I further find and conclude Claimant sustained a back injury affecting his cervical and lumbar spine.

B. Nature and Extent of Disability

Having found that Claimant suffers from compensable knee, neck, and back injuries, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186

(1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

(1) The Scheduled Disability Benefits

If the permanent disability is to a member identified in the schedule, as in the instant case, the injured employee is entitled to receive two-thirds of his average weekly wage for a specified number of weeks, regardless of whether his earning capacity has been impaired. See Henry v. George Hyman Construction Co., 749 F.2d 65, 17 BRBS 39 (CRT) (D.C. Cir. 1984).

In the case of permanent partial disability, Section 8(c)(2) of the Act provides an employee with "leg lost" compensation for 288 weeks at a rate of sixty six and two-thirds percent of his average weekly wage. Section 8(c)(19) of the Act further states that "compensation for permanent partial loss of use of a member may be for proportionate loss or loss of use of the member."

On July 14, 2003, Dr. Sardinas assigned a ten percent permanent impairment to Claimant's right knee. According to Dr. Sardinas's deposition by written questions, he believed the "disability rating" according to AMA Guidelines was "fair." Similarly, Dr. Barrash agreed that a ten percent disability to Claimant's right knee was "fair." Only Dr. Freeman disagreed with the ten percent impairment rating. He assigned only a two percent impairment to the knee due to the "partial meniscectomy" performed subsequent to the May 2002 accident.

Despite the opinions offered by the physicians, Claimant requests an award of scheduled permanent partial disability based on an 11% to 15% impairment. Claimant argues that the Act does not require a disability evaluation based on the AMA Guidelines. Rather, Claimant suggests that the California system of disability rating should be applied in the present case. According to Claimant, the California system considers the extent an injury interferes with his ability to work and it

awards an additional ten percent impairment for a scheduled injury to "a dominant member."[19] In support of his contentions, Claimant relies on Cotton v. Army & Air Force Exchange Services, 34 BRBS 88 (2000).

I find Claimant's reliance on Cotton to be misplaced. In Cotton, a physician assigned a ten percent impairment to the claimant's ankle. Rather than basing the impairment rating on the AMA Guides, the physician based his opinion on "subjective factors" which was acceptable under the California compensation system. Cotton, supra at 89. The Board stated that the Act only requires use of the AMA Guides in cases involving hearing loss and voluntary retirees. However, when an ALJ relies on an impairment rating not made in accordance with the AMA Guides, the ALJ's conclusions must be "rational, reasonable, and in accordance with the law." Id. The Board upheld the ALJ's finding of a ten percent impairment because the award was based on a medical opinion, rather than the "claimant's allegations of pain alone." Id. at 90.

Unlike Cotton, the present record does not contain any medical opinions assigning an impairment rating of greater than ten percent. To award an impairment greater than ten percent without further support in the record, would essentially grant an award solely on the basis of Claimant's complaints of pain. In accordance with Cotton, such an award would not be "rational, reasonable, or in accordance with the law."

Based on the opinions of Dr. Sardinas and Dr. Barrash, I find and conclude that the record supports an impairment rating of ten percent. According to the joint stipulations, Employer made scheduled payments to Claimant reflecting an accepted impairment rating of ten percent, which shall not be disturbed. Employer shall pay Claimant scheduled disability benefits for the right knee injury at a rate of $869.01 per week ($1303.52 x 66 2/3% = $869.01). Because the impairment of Claimant's knee is ten percent, Employer shall pay scheduled disability benefits for 28.8 weeks at the aforementioned rate. (10% x 288 weeks = 28.8 weeks). Thus Claimant is entitled to a total of $25,027.49 ($869.01 x 28.8 weeks = $25,027.49) for the scheduled injury to his right knee.

[19] The exhibit submitted by Claimant refers to AMA guidelines and does not mention an automatic 10% impairment for loss of a dominant member. Rather, the exhibit specifically states the following "[w]hen there is a permanent impairment of a dominant **upper** limb or hand, up to twenty percent (20%) of the assessed rating may be added, as it is recognized that a greater impairment exists in such cases. (CX-20).

(2) The Non-scheduled Disability Benefits

It is axiomatic that once a claimant has a permanent impairment/disability his status remains permanent. See Davenport v. Apex Decorating Company, Inc., 18 BRBS 194, 196-197 (1986)(MMI assigned on two separate dates). If a physician does not specify the date of maximum medical improvement, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15 (1988).

I find that the record supports an MMI date of July 18, 2003. The record contains a "Report of Medical Evaluation" by Dr. Sardinas which specifically sets forth the date of Claimant's MMI at July 18, 2003, which is also the date Dr. Sardinas assigned Claimant's impairment rating. The opinions of Dr. Barrash and Dr. Freeman indicate Claimant was at MMI at the time of their examinations, which respectively occurred in October 2003 and February 2004. Consequently, I do not find these later opinions of MMI to be in conflict with the medical evaluation completed by Dr. Sardinas on July 18, 2003.

Through deposition testimony taken after April 2004, Dr. Sardinas stated that, in October 2003, he released Claimant to full duty work and placed Claimant at MMI because Claimant wanted to return to work. He stated Claimant should not have returned to work prior to April 2004, but needed to be at MMI before he could return to his employment. Arguably, Dr. Sardinas' deposition testimony establishes a later date of MMI for Claimant. However, I do not find such an argument persuasive in light of the earlier credible impairment rating and MMI date assigned by Dr. Sardinas.

Consequently, I find and conclude Claimant reached MMI on July 18, 2003, pursuant to the initial opinion of Dr. Sardinas, and he has suffered a permanent disability since that date.

At the time of his injury on May 20, 2002, Claimant was employed as a truck driver. According to the FCE dated January 20, 2003, Claimant's job required him to drive an 18-wheel truck, operate a ship crane, "go in and out of ships," and operate "loaders." He also unloaded ships, acted as a "signal man," secured containers, and carried loads weighing approximately 100 pounds.

On October 27, 2003, Dr. Sardinas released Claimant to

unrestricted full-duty employment. Until that time, Claimant had not been able to return to his regular or usual employment. As a result, I find and conclude that Claimant has established a **prima facie** case of total disability from May 20, 2002 through October 26, 2003.

Employer argues Claimant was not disabled after October 27, 2003 because Dr. Sardinas released Claimant to unrestricted work activities in October 2003, January 2004, and February 2004. Further, Dr. Barrash agreed that Claimant could return to work on October 27, 2003, and Dr. Freeman opined Claimant could have returned to unrestricted activities as early as October 8, 2003 or August 20, 2002.

Nonetheless, Claimant contends he remained totally disabled until he returned to work on April 2, 2004. Claimant relies on the deposition testimony of Dr. Sardinas, which indicates the October 2003 release was "premature." Dr. Sardinas testified that he did not believe Claimant was capable of returning to work prior to April 2004. In fact, Claimant continued to complain of lower back problems from November 2003 through April 2004. On January 16, 2004, Dr. Sardinas opined that the herniated disc in Claimant's lumbar spine may have interfered with his ability to earn pre-injury wages.

Yet, Dr. Sardinas never changed Claimant's work status while treating him from October 2003 through April 2004. His vacillating explanation for continuing Claimant on a full work status during the entire period from October 2003 to April 2004, and never opining that Claimant was disabled from working, is not persuasive or credited. His explanation for releasing Claimant at his request is contradicted by his continued opinion that Claimant could work without restrictions.

For the first time, on October 7, 2004, Dr. Sardinas affirmatively responded to written questions propounded by Claimant that his October 27, 2003 release of Claimant to return to work was premature. On October 7, 2003, Dr. Sardinas also indicated, for the first time, that the best evidence of when Claimant could return to work and the best evidence of Claimant's ability to continue working was April 1, 2004. I find this change in opinion without explication is clearly an unreasoned medical opinion not worthy of any deference or weight.

In establishing total disability, the claimant's credible complaints of pain alone may be enough to meet his burden.

Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989); Richardson v. Safeway Stores, 14 BRBS 855 (1982); Miranda v. Excavation Constr., 13 BRBS 348 (5th Cir. 1980). Dr. Sardinas indicated in his deposition that he released Claimant to full duty work at Claimant's request. The credible evidence of record does not support a finding that Claimant was unable to perform his former job or was disabled from doing so. Although the medical records of Claimant's treating physician reflect continued complaints of tenderness in his lower back, Dr. Sardinas never changed his work status or precluded him from working or opined that Claimant was disabled from returning to his former job. Thus, I find and conclude that the medical evidence of record does not support a conclusion that Claimant was disabled from performing his former job from October 27, 2003 to April 1, 2004.

Based on the foregoing, I find and conclude that Claimant was temporarily totally disabled from May 20, 2002 through July 17, 2003. I further find and conclude that Claimant was permanently totally disabled from July 18, 2003 through October 26, 2003. I find and conclude that Claimant was not disabled from performing his former job from October 27, 2003 to April 1, 2004 and that Employer/Carrier are not responsible for any compensation benefits for such period. According to the record, Claimant returned to employment on April 2, 2004 and suffered no loss in his wage earning capacity. Consequently, I find and conclude Claimant is not entitled to any disability compensation from October 27, 2003 through present and continuing.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer was notified of Claimant's injuries on May 20, 2002, and began paying compensation benefits on May 21, 2002. Employer filed its notice of controversion on July 11, 2002. On September 5, 2003, Employer/Carrier filed a second notice of controversion disputing Claimant's left knee impairment rating and the FCE findings.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified

of his injury or compensation was due.[20] Thus, Employer was liable for Claimant's disability compensation payments on June 3, 2002. Because Employer began payment of compensation on May 21, 2002, Employer is not liable for any penalties.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[21] A

[20] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

[21] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest

service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from May 20, 2002 to July 17, 2003, based on Claimant's average weekly wage of $1303.52, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from July 18, 2003 to October 26, 2003, based on Claimant's average weekly wage of $1303.52, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay Claimant scheduled disability compensation, arising from his work-related permanent partial 10% impairment to his right leg, at a rate of two-thirds of Claimant's average weekly wage of $1303.52 for a period of 28.8 weeks (10% of the 288 weeks provided under the schedule). 33 U.S.C. § 908(c)(2), (19).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2003, for the applicable period of permanent total disability.

5. Employer/Carrier shall continue to pay all reasonable, appropriate and necessary medical expenses arising from Claimant's May 20, 2002, work injury, pursuant to the provisions of Section 7 of the Act.

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indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **March 1, 2004**, the date this matter was referred from the District Director.

6. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

7. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

8. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 1st day of March, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge